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No. 77-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

GRIFFIN B. BELL, ET AL.,

Petitioners,

-v.-

LOUIS WOLFISH, ET AL.,

Respondents.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondents, through their counsel, respectfully request leave to proceed here in forma pauperis and permission to file in typewritten form and without payment of fees and costs their brief in opposition to the Government's petition for a writ of certiorari. Counsel certifies that, throughout the proceedings below, respondents were represented by counsel appointed pursuant to the Criminal Justice Act.

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New York, New York
August 23, 1978

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the within brief in opposition to a petition for writ of certiorari, and one copy of respondents' application to proceed in forma pauperis, have been mailed by first class mail to the Solicitor General of the United States, and that two copies of the brief and one of the application for forma pauperis relief have been mailed to the United States Attorney for the Southern District of New York.

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OPINIONS BELOW

The inmates of the Metropolitan Correctional Center ("MCC") adopt the statement of the petitioners ("the government").

JURISDICTION

The inmates of the MCC adopt the statement of the government.

QUESTIONS PRESENTED

1. Whether double-celling and overcrowding of pretrial detainees in the conditions prevailing at the MCC are unconstitutional under the Fifth Amendment.

2. Whether a total prohibition on the receipt from outside the institution of books and other reading matter except from the publisher is violative of the First Amendment.

3. Whether routine visual anal and genital searches without probable cause after supervised contact visits are violative of the Fourth and Fifth Amendments.

4. Whether prohibiting a non-disruptive pretrial inmate from observing the search of his cell from a reasonable distance is violative of the Fourth and Fifth Amendments.

5. Whether a total prohibition on the receipt of personal property from outside the institution is violative of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The inmates of MCC add to those provisions in the government's petition the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Prior Proceedings

A pro se petition for writ of habeas corpus seeking relief from alleged unconstitutional conditions of confinement at the New York Metropolitan Correctional Center (hereinafter, "MCC") was filed on November 28, 1975, by the inmates of that institution. Thereafter, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel for the inmates, and an amended petition was filed asserting that the inmates had been denied their constitutional rights under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments.

Pursuant to an order dated December 2, 1975, the case was

declared a class action under F.R.C.P. 23(b)(1) and (2). See Wolfish v. Levi, 406 F.Supp. 1243, 1244-1245 (S.D.N.Y. 1976).

The inmates moved for partial summary judgment. After a tour and examination of the MCC, on January 5, 1977, the district judge granted the motion as to several of the issues and, insofar as relevant to the issues raised by the government here, enjoined double occupancy of single-person cells ("double-celling") (see infra at 3) and enforcement of the regulation prohibiting receipt of books and magazines except from publishers -- the "publisher-only" rule (see infra at 7). Wolfish v. Levi, 428 F.Supp. 333 (S.D.N.Y. 1977).

Trial of the remaining issues commenced on February 28, 1977, and continued through March 30, 1977, resulting in a record of testimony of approximately 3,000 pages and several hundred exhibits. The district judge personally visited the MCC on two additional occasions: on March 5 and March 16, 1977.

On September 15, 1977, the district judge rendered a decision on the matters not previously resolved. Of relevance to the issues raised in the government's petition, the court prohibited routine visual anal and genital searches of all inmates after contact visits except when based on probable cause; ordered that pretrial inmates be permitted to observe from a reasonable distance the routine and unlimited searches of their cells except where good reason prevented it; and enjoined the institution's blanket prohibition of receipt by inmates of packages, requiring that reasonable regulations for such receipt be established. The government appealed to the court of appeals, which affirmed the district court's order on these issues.

B. Double-Celling

Although the MCC was built primarily as a pretrial detention facility (App. G at 202a, 213a; see App. F at 74a)* intended to house one prisoner in each of 389 cells (App. G at 203a),* in practice the institution had designated 121 of the cells for the housing of two inmates (App. G at 203a;** A.51-81***). Based on the papers filed on the summary judgment motion and on the judge's personal observation of the physical conditions of the cells themselves and the consequences of overcrowding on the multipurpose rooms which are the heart of the modular living system at MCC, the judge concluded that housing two people in these one-person cells was unconstitutional. (App. G at 206a-209a.)

> At the core of the planning and design of the MCC was the functional unit management concept, in which "all activities and services for detained persons will, whenever possible, be provided directly in the unit where these persons are billeted."
>
> Government Brief on Appeal to the Second Circuit, Docket No. 77-2035 (hereinafter "Brief on Appeal") at 8.****

In fulfillment of this scheme, virtually all activities of the prison day are consigned to the multipurpose room of each living unit at the MCC, which serves all the inmates housed in the 48 adjoining cells (App. G at 201a-202a). Inmates are not

*References preceded by "App." are to the appendices to the government's petition for writ of certiorari.

*With one person to a cell and each dormitory housing an intended 10 persons (App. A at 21a), the MCC was expected to house 449 people (Petition for writ of Certiorari at 6, hereinafter "Pet."). In his affidavit, the warden acknowledged that the population went up to an "average of well below 600" and that, though a projected population of 620 had been avoided up to this time, he could not accurately predict what the population might increase to in the future (A.89).

**Double-celling was only one of the three ways in which the population of MCC was increased by the government beyond the institution's design capacity. The population of the dormitory area was increased to 200% of capacity -- from 60 to 120 inmates -- and housed people, not on an occasional basis (see Pet. at 7), but on a regular and continuing basis, in commons areas and on balconies. The district court enjoined both of these latter types of housing, limiting the dormitory population to its design capacity of 10 inmates per dormitory unit (App. F at 125a-129a). The court of appeals sustained the order, except that a remand was ordered to determine whether the dormitories might provide constitutionally valid housing for some number of inmates between 10 and 15 (App. A at 22a-23a). The government does not seek the Court's review of these orders.

***References preceded by "A" are to the joint appendix filed in the court of appeals.

****The government itself emphasizes that the modular concept was intended, among other purposes, to afford some privacy to inmates by providing individual cells (Brief on Appeal at 10).

permitted to visit the general library or the commissary (Stipulation of Facts A.2532; App. F at 111a). The institution contains no recreation yard, no central auditorium, no indoor gymnasium, no chapel, no dining room, no shop, no industry, and no educational facility (App. G at 208a n.6; App. F at 91a; A.2532). Rather, any recreational, educational, or religious activity which may take place, as well as telephoning, showering, eating, television watching, and physical exercise occur in the modular unit. Visiting takes place in an adjoining but separate room. Inmates leave the modular unit only for court appearances, infirmary or medical visits, attorney visits, and, weather permitting, one hour of daily recreation on the roof (Stipulation of Facts A.2532; App. A at 5a; App. F at 80a).

The judge found that the multipurpose room was designed and furnished for use by the designated number of single-room occupants (App. G at 207a). The excess population made the multipurpose area oppressive and "congested, noisy, unworkable for their intended uses," and he concluded that overcrowding added to the pressure on the inmate to return to his cell for activities (App. G at 207a).

As for the cells themselves, the district judge, again based on uncontradicted information, outlined the conditions created when two people were housed in an area designed and constructed, according to Paul Silver, the architect of MCC, to house one (App. G at 205a).* The judge found the use of bunk beds inconsistent with the design of the 75-square-foot room. With the use of bunks, cold air from a vent blew directly on the upper bed about a foot above body level. To avoid this, the inmates blocked the air vents, producing musty and foul-smelling rooms (App. G at 206a-207a). The district judge found that, whereas one inmate had two storage drawers under a single bed,

*The architect stated:

> [T]here is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space....
>
> (App. G at 205a).

the use of bunks resulted in no drawer being available or the presence of only one for use by both residents (App. G at 207a). He also found that both the single shelf for toiletries and a second shelf for other items were inadequate for two people, and that there was no place to hang clothing (App. G at 206a). With the room containing also a wash basin, an uncovered toilet, an extension lamp, a desk, and one or two chairs, he determined that walking space was limited to a narrow aisle running the length of the room (App. G at 203a). He noted that inmates were locked into these inadequate cells for at least seven and one-half hours during the night as well as for the daily head counts (App. G at 208a). Further, under the modular confinement concept, these cells are the only place to which an inmate may escape from the noisy, congested, and "useless" multipurpose rooms.

The judge found that, based on the "plain visual evidence,"

> [t]here is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet....
>
> (App. G at 206a).

He concluded:

> The open toilet, at mealtimes and in the middle of the night, remains a stark centerpiece. The fundamental denials of decency, privacy, personal security, and, simply, civilized humanity are all in essence the same when two people are thrown into single prison cells like these. The qualities of threat, nausea, and degradation are visible and palpable for any observer.
>
> (App. G at 211a).

In the summary judgment order, the district judge prohibited double-celling* (App. D at 50a).

The court of appeals affirmed the findings of fact and conclusions of law, observing that double-celling was dehumanizing and an infringement on minimal privacy and personal dignity, and resulted in intolerable demands being made by the increased

*The judge's order permitted double-celling for up to 10 days upon certification by the warden of an emergency (App. D at 51a).

population on the commons areas facilities* (App. A at 17a-18a). The court of appeals rejected a claim that fiscal conditions and administrative convenience permitted the unconstitutional overcrowded conditions (App. A at 12a, 19a).

C. The Publisher-Only Rule

The MCC imposed a prohibition on receipt of books, magazines, and other written material from any source other than publishers and book clubs.** The government argued below, as here, that the prohibition, commonly known as "the publisher-only rule," is necessary to prevent the entry of contraband into the institution (Pet. at 36).

The district court found the prohibition a violation of the First and Fifth Amendments (App. G at 215a) and rejected as inadequate the justification proffered for the prohibition. However, recognizing that a legitimate correctional interest existed, the judge ruled that all incoming packages and their contents might be inspected and searched (App. G at 223a-224a).

The court of appeals affirmed, stating, "the 'publisher-only' rule severely and impermissibly restricts the reading material available to inmates ... [and is] inconsistent with both the first amendment and due process" (App. A at 26a).

D. Visual Anal and Genital Searches

Following every contact visit, whether with attorney, family member, or friend, made by an MCC inmate, the inmate was subject to a strip search. This procedure required that, under the observation of a correctional officer, the inmate remove all his clothing, display his hands and armpits, open his mouth, lift

*The issue of double-celling for sentenced prisoners in cells of larger dimensions was remanded to the district court for findings under the Eighth Amendment (App. A at 17a, 20a).

**The government's claim that books may now be ordered by inmates from bookstores (Pet. at 36) is not in the record and has not been presented to either the district court or the court of appeals. If the government believes that any unilateral change in its procedures entitles it to a modification of the existing order, the appropriate remedy is an application to the district court.

his genitals, and display the soles of his feet. As part of this procedure, the inmate is also required to bend over and spread his buttocks for a visual anal inspection. For female inmates, the inspection includes as well a visual vaginal inspection.

The district judge, although finding the strip search "unpleasant, embarrassing, and humiliating" (App. F at 149a), accepted the opinion of the Bureau of Prisons that a "strip search may serve as a deterrent to people planning to secrete and import forbidden things" (App. F at 151a) and sustained the strip search. However, he found the visual anal and genital searches to be inherently repulsive and shocking (App. F at 153a):

> [T]he bending over to spread buttocks for anal inspection plunge[s] the reaction [of the inmate to the search] to a level of deep degradation and submission. The postures [the inmates] are compelled to assume are calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict.
>
> (App. F at 149a).*

He found the searches not rationally related to security interests, and thus unreasonable (App. F at 153a). The facts which demonstrated that the search was unreasonable were that, upon entering the institution, the visitor and his clothing were thoroughly searched by magnetometer and other devices; that the admissions officer could have prevented visitors from taking any item in their possession to the visiting room; that the inmate was clothed in a brightly-colored, one-piece jumpsuit that zipped up the front and which would have to be removed from at least the torso in order to secrete anything in the anal or genital

*The district court found that there had been incidents of "insultingly suggestive remarks and banal but terrifying expressions of aggression," and credited inmate testimony that such incidents had caused them to forego visits (App. F at 149a).

cavity;* that the social visitor and the inmate were in full view of a correctional officer at all times during the visiting period; that the inmate was not permitted use of the toilet facility in the visiting room, and the visitor could not use the facility without first notifying the correctional officer on duty; that weapons and other dangerous instruments were discoverable by metal detectors and other equipment similar to that in common use at airports; and that urine tests were routinely given to detect the use of drugs (App. F at 130a-131a, 134a-135a, 151a-153a).

Significantly, the district court found that, based on clear and uncontradicted evidence, even if an inmate were to insert an object beyond the anal sphincter, it would be undetectable by the visual search conducted by the officer, thus rendering such a visual examination useless (App. F at 150a).** Further, the evidence showed that anything held between the buttocks would cause an easily detectable abnormal gait (A.773-774), making the search superfluous. Based on the specific factors in this case, the district court concluded:

> In all the circumstances, the demands of security are amply satisfied if inmates are required to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstrate the absence of concealed objects.
>
> (App. F at 153a).***

On appeal, the court of appeals affirmed the district court:

> The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly,

*The district judge found these uniforms to be unconstitutional for use by pretrial inmates (App. F at 165a-169a). He did not consider the uniforms in evaluating the unreasonableness of the government's assumptions concerning the need for visual searches. However, the court of appeals reversed the district court's holding on uniforms (App. A at 34a), so they now become relevant to consideration of the reasonableness of such searches.

**The scientific evidence was confirmed by the fact that no anal inspection has ever revealed any contraband, and only once did a vaginal inspection reveal an attempt to conceal drugs (App. F at 150a).

***The judge permitted the searches to be conducted on probable cause (App. F at 153a).

> in the circumstances presented by this record, the procedure shocks one's conscience.
>
> (App. A at 30a).

E. Pretrial Detainees' Observance of Random, Frequent, and Unannounced Searches of their Cells

The MCC administration randomly and frequently searches either groups of cells or individual cells. Inmates are not permitted to observe searches of the units, and are permitted to observe searches of the individual cells in the apparently standardless discretion of the correctional officer. Searches sometimes occur after the inmate is locked into his room, in which case he is ordered to leave the room while the search takes place (T.1078; App. F at 154a; A.92-93).*

The evidence below also showed that, although the MCC staff is directed to leave the searched rooms as they found them (A.1241), correctional officers often leave the searched rooms in disarray, with personal items, bedding, and legal papers scattered about (App. F at 154a).**

The government asserted below that it was necessary to exclude the inmates from observing the search in order to prevent the destruction of contraband before it could be seized, and because witnessing searches would antagonize inmates. The court found that the present practice of excluding inmates already raised tensions and hostilities (App. F at 156a) which would be reduced by the remedy (App. F at 154a-155a) and that destruction of property would be prevented by having the inmate

*References preceded by "T" refer to pages of the trial transcript.

**Prior to the district court's order, anything found in a prisoner's cell could be seized by a correctional officer. No receipt for the seized item was given to the inmate, and the property seized was turned over to the chief correctional officer for destruction or, if money, for deposit in the Bureau of Prisons fund (Stipulation of Facts at 55).

In the summary judgment, the district court ordered that receipts be given for property seized; in the final judgment, the court directed that a procedure be established by the institution for a hearing to determine whether the seized property was contraband and how the property should be disposed of (App. E at 72a; App. D at 62a).

remain at a reasonable distance from the cell.

The court of appeals agreed that

> ... the practice in actual operation, constituted a "regime of absolute and unquestionable tyranny."
>
> We see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband.
>
> (App. A at 31a; footnote omitted).

F. Receipt of Packages

Except for one food package allowed at Christmas (Stipulation of Facts at 56; T.490), the government enforces an absolute prohibition on receipt of all packages by all inmates at the MCC. No personal effects or food may be brought into the institution from outside.

The justifications given below by the government for this prohibition were exclusion of contraband; the prevention of fighting, stealing, and extortion among inmates; narrowing the gap between those inmates with property and those without; and avoidance of storage and sanitation problems (see Brief on Appeal at 99-100).

The district judge found this justification "arbitrary and unacceptable" (App. F at 166a), emphasizing that the government's own practice of selling items from the commissary, including some at substantial cost (App. F at 164a),* belied any real concern about fighting, stealing, and extortion. He concluded that it was arbitrary to permit those inmates with funds to buy from the commissary and to deny those without money the opportunity to receive from outside the institution similar items (App. F at 165a). Sanitation and storage concerns were held inconsistent with the institution's own sale of food (App. F at 165a). Entry of

*These goods include snack foods, cosmetic items, batteries, clothing, radios, and watches.

contraband may easily be prevented by a search of incoming packages and by control of their size and contents (App. A at 33a).

The court of appeals sustained the judgment, requiring reasonable regulations regarding packages (App. A at 33a). Based on the evidence presented at trial, the court of appeals noted that other institutions housing inmates needing close custody have far more liberal rules concerning packages than did the MCC (App. A at 32a).

REASONS FOR DENYING THE WRIT

A. The five conditions of confinement raised in the petition are unconstitutional under any of the tests, and therefore this case is an inappropriate vehicle for the resolution of the issues presented.

In its petition the government argues that three circuits have formulated differing standards for evaluating the constitutionality of restrictions of pretrial detainees. These variations, it is argued, necessitate review (Pet. at 17-21).

It is our view that this case is an inappropriate vehicle for meaningful resolution of whatever actual differences, if any, the language in these cases may be thought to engender. The opinions and lengthy record in this case compel the conclusion that under any of the "standards" expressed in these three cases, the specific conditions of confinement for which the government has chosen to seek review would be held unconstitutional.

The standard articulated below is that pretrial detainees may be subjected only to those restrictions and privations inherent in confinement or justified by compelling necessities of jail administration.* Once such necessity is established, the means used to ensure legitimate interests in security must be reasonable (App. A at 12a, 13a).

*The government's reading that the decision below requires that every restriction imposed upon pretrial detainees be inherent in that confinement or supported by compelling necessity (Pet. at 15, 21, 22, 23, 24) is incorrect. The court of appeals states clearly that relief should be afforded detainees when "substantial deprivations not compelled by administrative necessity, are discovered" (App. A at 2a; emphasis added).

The standard under Campbell v. McGruder, Docket No. 75-1350 (D.C. Cir. March 30, 1978), although linguistically variant, articulates the same substantive principle:

> [A]lthough infringements on liberties not deemed fundamental might not in general be subject to the strictest scrutiny [citations omitted], each deprivation of the jail environment renders pretrial detention more severe as punishment and thus further violates the presumed innocence of the pretrial detainee.... Therefore each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration.

Slip op. at 16-17.

The First Circuit's decision in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978), which focuses on "whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of confinement; and whether they are otherwise in accordance with law" (570 F.2d at 371),* is viewed by the government as substantially more stringent and the one which should be adhered to (Pet. at 25 and n.21).**

Whichever standard is applied for review of the specific governmental actions presented by the petition, however, that conduct is unconstitutional. The findings below manifest conclusions that in the five specific areas of prison regulation

*Relying on other parts of Feeley v. Sampson, supra, 570 F.2d at 371, the government equates "the reasonable relationship" standard to one based on minimum standards of humanity and decency (Pet. at 28-30). However, there, the court was addressing a strict application of equal protection analysis; it rejected the idea that any invalid restriction on convicted people would be automatically unconstitutional when applied to detainees, but concluded that it was appropriate to enjoin enforcement as against both convicted people and detainees of a restriction which fell below minimum standards of humanity and decency.

**The government's espousal of the reasonable relationship standard in this case -- one of the few involving a federal prison -- is contrary to the position taken by the United States in other litigation when state detention facilities are involved. In those cases, the government has urged adoption of the Second Circuit standard. United States trial memorandum in Adams and United States of America v. Mathis, M.D.Ala. Civ. Action No. 74-70-S at 10-12; United States trial memorandum in Vest et al. and United States of America v. Lubbock County Commissioners Court et al., N.D.Tex. Civ. Action No. 5-76-53 at 6-8.

raised by the petition, the challenged governmental conduct was either arbitrary and capricious or lacked any reasonable relationship to the limited purpose of confinement. The challenge by the petition to the decision on each of the five areas -- double-celling (see infra at 15-17); the publisher-only rule (see infra at 17-20); visual anal and genital searches (see infra at 20-22); a detainee's presence during the search of his cell (see infra at 22-23); and receipt of personal property (see infra at 23-24) -- is little more than an attempt to relitigate the findings below.

The government insists that the courts failed to give sufficient deference to the opinions of correctional officials (Pet. at 18, 24-25 and n.20, 34, 41). However, the decisions below, and the record upon which they are based, demonstrate the attention, consideration, and deference given to correctional officers testifying for the government. The opinions expressed were rejected only where the "beliefs were unreasonable" or the conditions imposed upon the detainees were an "exaggerated" response to reasonable beliefs (see Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 128 (1977)).

Indeed, the deference accorded correctional expertise in management of the MCC is amply demonstrated by the court of appeals' refusal to interfere with precise regulation of telephone accessibility, social visiting hours, and commissary orders (App. A at 16a-17a and n.16).* The court also refrained from any interference with regulations as to the contents of packages or property which an inmate may receive and retain in his cell (App. A at 32a-33a). The court deferred to correctional judgment in the matter of detainee uniforms and clothing, despite its own belief that identification of inmates could be achieved in a less degrading manner (App. A at 34a).

As for the issues now contested by the government in its

*These issues are not raised by the certiorari petition.

petition, the evidence warranted no decision other than the one rendered by the court of appeals, irrespective of the "standard" the government seeks to apply.

B. Double-Celling

The government's contention that a per se prohibition on double-celling (Pet. at 29 n.25, 30) was imposed based solely on an institutional privacy interest (Pet. at 28) and in disregard of administrative and fiscal concerns (Pet. at 28-29) is erroneous.

While there is considerable support for prohibiting double-celling solely on the basis of rated capacity, the courts below based their judgments on much more (App. G at 206a-209a). For example, the court considered the testimony of the architect of the MCC that he designed each cell for one person, as well as the effect of double-celling on individual cells and the multi-purpose areas of the institution (App. G at 205a).

After viewing the prison, the district judge found not only that double-celling deprived an inmate of privacy, but that actual conditions were simply inadequate for the needs of two persons. The district judge noted that the size of the cells allowed only 37 square feet per person when used to house two people; that there was a lack of walking space and storage area for basic toilet items and clothing; and that the air vents were located so that they blew cold air only one foot from the inmate who slept in the upper bunk (App. G at 203a, 206a-207a). There was no place for one person to be alone or "outside another's toilet (App. G at 206a).

Overcrowding, the court concluded, also rendered planned commons areas "unworkable for their intended uses," and the impact of overcrowding on the multipurpose rooms diminished the significance of the shorter period for lock-in in cells (App. G at 207a, 208a). These factors led to the ultimate determination that there was a denial of "decency, privacy, personal security, and, simply, civilized humanity ... when two people are thrown

into single prison cells like these" (App. G at 211a). The court of appeals agreed (App. A at 17a-18a).*

There is a peculiar irony to the government's argument in support of double-celling because the government has been prominent in its criticism of that very practice in state and local facilities.**

The government claims an "individual's generalized interest in privacy lacks substantial weight during institutional confinement in a jail" (Pet. at 28). Lanza v. New York, 370 U.S. 139, 143 (1962), is the authority relied upon. First, Lanza is inappropriate because the decision below was based on grounds broader than the single factor of privacy.*** It was premised on findings that double-celling conditions of the MCC were degrading (App. G at 211a) and an infringement on personal dignity (App. A at 17a-18a). Second, Lanza involved the issue of whether eavesdropping by prison officials on a conversation between a convicted person and his brother violated the Fourth Amendment. Nothing in that case implicates a concern with prison conditions involving the forced confinement of inmates

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*The court of appeals remanded to the district court for further findings under the Eighth Amendment the question of use of 21 larger cells to house sentenced prisoners, some of whom were members of the work force (App. A at 20a; see App. G at 204a).

**The government's condemnation of double-celling arises because the practice overtaxes the facility, overworks personnel, and prevents minimum standards from being met. United States Bureau of Prisons, THE JAIL: ITS OPERATION AND MANAGEMENT at 102 (1970); see also American Correctional Association, MANUAL OF CORRECTIONAL STANDARDS at 49 (1966) (the Bureau of Prisons participated in the preparation of these standards, see Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 396 n.5 (2d Cir. 1975)). Furthermore, the United States Department of Justice, FEDERAL STANDARDS FOR CORRECTIONS (Draft June 1978) (hereinafter, "Draft Federal Standards") provide that all cells rated for single occupancy actually house only one inmate (Draft Federal Standards - Physical Plant Standard 002 at 10) and that these cells have at least 60 square feet of floor space (id., Standard 004 at 10). The position taken by the Department of Justice in this case is in direct conflict with its own draft standards intended to provide "guidelines for the decent and humane operation of ... corrections and detention facilities." Draft Federal Standards, Introduction at 2.

***The Court recently noted in another context that inmates have a right to privacy which will be protected. Houchins v. KQED, ___ U.S. ___, 46 U.S.L.W. 4830, 4831 n.2 (June 26, 1978).

in overcrowded conditions for protracted periods.

Whatever administrative convenience in double-celling is claimed by the government to exist (Pet. at 28-29), such an assertion has never been deemed to override constitutional interests. Estelle v. Williams, 425 U.S. 501, 505 (1976; Procunier v. Martinez, 416 U.S. 396, 421 (1974). Similarly, it has long been recognized that protection of constitutional rights "cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." Watson v. City of Memphis, 373 U.S. 526, 537 (1963). The assertion that the government is now prevented from fulfilling its own long-planned modular living design for the MCC (see Brief on Appeal at 6-9) by fiscal restraints is absurd in light of the fact that the Department of Justice is asking others in the country to abandon double-celling despite the possible cost, and is planning to have those incarcerated in federal prisons held in single-person cells:*

> [T]he Department of Justice must -- if the standards are to have any meaning -- be willing to embrace the goals and objectives set forth in the standards and apply those standards to its own correctional programs.... [I]t is my intention to ask the Bureau of Prisons to submit a plan, which delineates each standard which is not currently met, the resources and steps which will be necessary to meet it and a reasonable time for its accomplishment.
>
> Draft Federal Standards, Introduction at 2.

C. The Publisher-Only Rule

Conceding, as it must, that detainees possess a First Amendment right to access to books, magazines, and other reading materials, the government maintains that the court below

*Under the Draft Federal Standards, costs do not prevent an end to double-celling, but will be merely a factor in determining the plan of implementing double-celling. It is recognized that the time and expense involved in construction or renovation of a physical plant to end double-celling may require "a longer period of time" than other changes, but responsible officials are expected to "immediately develop a plan for meeting the standards" within a reasonable time. Draft Federal Standards at 9.

erred in striking down the publisher-only rule because such a rule did not "meaningfully interfere" with that right. In fact, the rule severely limits access to reading materials, particularly to indigent inmates, and constitutes a serious abridgement of First Amendment rights.

Books and magazine subscriptions cost money. As the district court noted, indigent inmates are not situated to order such items (App. F at 215a). The rule also assumes that the inmate has knowledge of publishers and their addresses, that he can communicate easily with publishers or that family or friends are in a position to assist him in dealing with publishers, and that the order will be filled and the book delivered during his stay at the MCC.

Thus, for the vast majority of detainees, the publisher-only rule, by prohibiting the receipt of reading materials from their most likely source of family and friends, significantly infringes on First Amendment access to ideas. It is not surprising that such prohibition has been ill-received by the lower federal courts.*

These practical factors of access and expense are of great weight in determining whether constitutional protections are denied. Thus, in Procunier v. Martinez, supra, 416 U.S. at 419, the prohibition on use of law students in prison was held to be a denial of the right of access to the courts where the location

*Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975); Rhem v. Malcolm, 371 F.Supp. 595, 634 (S.D.N.Y.), affirmed, 507 F.2d 333 (2d Cir. 1974); O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582, 600 (E.D.Mich. 1977), 446 F.Supp. 436, 443 (E.D.Mich. 1978); Owens-El v. Robinson, 442 F.Supp, 1368, 1387-1388 (W.D.Pa. 1978); Mitchell v. Untreiner, 421 F.Supp. 886, 901 (N.D.Fla. 1976); Marion County Jail Inmates v. Broderick, 74 Civ. 434 (S.D.Ind. April 12, 1976); Lucas v. Wasser, No. 76-1057, Consent Order at 6 (S.D.N.Y. Sept. 30, 1976); Benjamin v. Malcolm, 75 Civ. 3073 S.D.N.Y. Aug. 14, 1975); Manicone v. Cleary, 74 Civ. 575 (E.D. N.Y. June 30, 1975); Detainees of Queens House of Detention v. Malcolm, 73 Civ. 1364 (E.D.N.Y. June 29, 1975) (summary judgment without opinion); Lambert v. Skidmore, Case No. C 2 74-135 (S.D. Ohio June 16, 1975) (consent decree); Inmates of Allen County Jail v. Bender, Civ. No. 71 F 32 (N.D.Ind. May 19, 1975) (consent decree); Miller v. Carson, No. 74-382-Civ.-J-S, Order and Preliminary Injunction at 14 (M.D.Fla. Jan. 31, 1975); Cooper v. Morin, Index No. 74 1411 (Sup.Ct. Monroe County, N.Y. March 21, 1975); Funches v. Beame, 73 Civ. 572 (S.D.N.Y. July 12, 1974); Inmates of Milwaukee County Jail v. Peterson, 353 F.Supp. 1157, 1168-1169 (E.D.Wis. 1973); Collins v. Schoonfield, 344 F.Supp. 257, 281 (D.Md. 1972).

of the prison at a distance from inmates' lawyers prevented the lawyer from conferring with his client or where the inmate was unable to pay the costs of the lawyer's trip to the prison. The publisher-only rule similarly imposes invalid constraints on First Amendment rights.

Pell v. Procunier, 417 U.S. 817 (1974) (Pet. at 36), furnishes no support for the government's position. There, the prohibition on individual personal contact between inmates and reporters did not violate the First Amendment because communication between them was otherwise available through the mail or third persons. Id. at 824-826. No adequate alternative is available when the publisher-only rule is involved. See Procunier v. Martinez, supra, 415 U.S. at 421; Johnson v. Avery, 393 U.S. 483, 488 (1969).*

The government's contention is that the publisher-only rule was essential to security interests and should have been respected by the courts below. There was no denigration of that interest. The court of appeals held only that the prohibition went far beyond what was required to protect the security interest because a search of incoming material could easily achieve that end (App. A at 26a-27a; n.27).** The government's own proposed standards corroborate the court's view that the publisher-only rule was overbroad. Under these standards, an inmate may

*The court of appeals rejected the government's contention that the MCC library provided a reasonable alternative, finding that inmates may choose to read books and magazines not in the library (App. A at 27a). The decision was correct because inmates are not permitted to go to the library, but must request books from a list and await their delivery. The MCC library is stocked primarily through donations of books. Newspapers are available only through the commissary for payment, and magazines are obtained from the dead letter section of the Postal Service. Books on the units are stripped paperbacks left over from drugstore racks (App. F at 108a).

**As both lower courts noted (App. A at 26a n.26; App. F at 217a), Woods v. Daggett, 541 F.2d 237, 240 (10th Cir. 1976), is inapposite on these facts. Woods was concerned with the federal penitentiary at Leavenworth, Kansas -- a maximum security prison where there had been bizarre efforts to carry contraband and which housed 2,000 convicted inmates with long sentences and significant prior records (Attachment T to Bureau of Prisons Policy Statement No. 7300.13B, June 24, 1971). The security precautions needed at Leavenworth are far different from those needed at a pretrial detention center such as the MCC. Further, to the extent that searching constitutes an administrative inconvenience, it is not a justification for the prohibition. Estelle v. Williams, supra, 425 U.S. at 505.

receive publications from any source, subject to search and inspection, except where there is clear and convincing evidence to justify limitations (Draft Federal Standards - Mail and Visiting Standard 002 at 63). There is no valid reason to disturb the court of appeals' judgment.

D. Reasonableness of Searches and Seizures

1. Visual Anal and Genital Searches

The government complains that the prohibition of visual anal and genital searches of inmates after contact visits except on probable cause is an unwarranted interference with the necessity to protect against introduction of contraband and weapons (Pet. at 40). The court concluded that the government's objectives could be achieved by less drastic means, including the security measures already in effect.* During a contact visit, both inmate and visitor are observed by a correctional officer through the visiting room's glass walls (App. F at 131a). All inmates are dressed in brightly-colored one-piece jumpsuits, zippered in front (A.528), and to insert any item into a genital or anal cavity, removal of the uniform from at least the torso would be necessary (see A.925). The visitor and his belongings are subject to careful scrutiny by electronic devices before the visitor leaves the lobby; the visitor may not carry any packages into the visiting room; the inmate may not use the visiting room's toilet, and the visitor may do so only upon requesting the key from a correctional officer (App. F at 130a, 131a, 134a, 151a; App. A at 15a). Thus, there is virtually no opportunity

*United States v. Park, 521 F.2d 1381, 1382 (9th Cir. 1975), demonstrates this very distinction. There, a visitor attempted to introduce into the institution a quantity of drugs secreted in a balloon, intended to be inserted into an inmate's rectum. The scheme was apparently detected by procedures, not involving an anal search, which disclosed the package before it could be concealed by the inmate.

for anal or vaginal smuggling.* It is also significant that uncontradicted expert opinion was that the visual search would not disclose items concealed beyond the anal sphincter (App. F at 150a) and that if items were held between the buttocks, that fact would be disclosed by the unusual gait which would result (A.773-774).

Thus, the government's position that contact visits may permit introduction of contraband is not in dispute, having been fully accepted by both lower courts. In prohibiting the routine imposition of anal and genital searches, the district court and the court of appeals took into account the extensive security precautions available to and used by MCC officials, and in addition, permitted the continuation of the very extensive strip search, including removal of all clothing and the raising of arms and the display of hands and soles of feet. Such a search is conducted upon every inmate following every contact visit. Clothing is thoroughly examined as well (App. F at 153a).**

The Department of Justice itself has adopted the approach taken by the courts here. Under the Draft Federal Standards, visual inspection of body cavities may be conducted only where there is real suspicion "which may be created ... [by] re-entry

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*The government's reference to two instances is imprecise. Only one visiting room incident occurred (A.1442), and the district court considered it inadequate to justify the search. As to the second incident, there is nothing in the record to show that the inmate had come from the visiting room (A.1447-1450).

**The cases cited by the government as constituting a division of authority involve significantly different factual contexts from the MCC's closely observed and regulated visits. Thus, the cases reflect the view that the searches prohibited in this case may be reasonable in other contexts. Daugherty v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973) (no connection with contact visit; a rectal examination given by a physician's assistant to an inmate being removed from a maximum security prison where there were many known instances of contraband and weapons concealed in the rectal cavity); Bell v. Manson, 427 F.Supp. 450 (D.Conn. 1976) (search after a trip outside the institution to court); Hodges v. Klein, 412 F.Supp. 896, 901 (D.N.J. 1976) (search after a totally private contact visit); Giampetruzzi v. Malcolm, 406 F.Supp. 836 (S.D.N.Y. 1975) (anal searches not indicated by the court, but strip searches justified because the inmates were categorized as high security risks after a due process procedure); Penn El v. Riddle, 399 F. Supp. 1059 (E.D.Va. 1975) (items of contraband found in clothing or work area of inmate just prior to search); Bijeol v. Benson, 404 F.Supp. 595 (S.D.Ind. 1975) (no facts as to circumstances of searches).

into general population in a secure facility from a visiting room where there is contact visiting that is not constantly monitored." Id., Security and Control Standard 013 at 37. At the MCC, contact visits are monitored, and therefore, under the government's own standards, routine searches are not necessary.

2. Inmates' Presence at Searches of their Cells

The court of appeals held that under the Fourth Amendment it was unreasonable to prohibit pretrial detainees from observing searches of their rooms from a reasonable distance. The government claims that there is no authority for anyone, free or in custody, to watch a search, and that the courts below failed to give appropriate weight to testimony concerning security interests (Pet. at 40-41).

Again the issue is misconceived. The question is not whether an individual has the right to observe a search, but what, under the circumstances, constitutes a search conducted in a reasonable manner. The prison's complete and legitimate power to search thoroughly a detainee's cell and all his belongings, at any time and without cause or reason, is unique in the realm of governmental power. The evidence (A.584-586; A.625; A.1033-1034) established that frequently inmate belongings, including their legal papers, were "not treated with tenderness;" that officers who rummaged through clothing drawers and possessions left them in disarray; and that such conduct gave rise to a legitimate belief by inmates that searching correctional officers either stole or removed possessions without authority (App. F at 154a). Preclusion of inmate observation of such routine searches, in the view of the court of appeals, constituted a regime of tyranny (App. A at 31a).

The government countered with the argument that removal of the inmate prevented transfer of contraband and unnecessary friction between the inmate and the searching officer (A.1240-1241). The means adopted to secure legitimate security interests was, as elsewhere, exaggerated and overbroad. The court of appeals

noted that the inmate could easily be held at a reasonable distance (App. A at 31a) which would preclude removal of the property. The difficult inmate could properly be removed from the scene (App. A at 32a).

Far more serious, in the eyes of the courts below, was adherence to the institution's own goal that inmate property be preserved and respected "as much as possible" (App. F at 155a). The disregard shown by correctional officers to inmate property warranted by the evidence was wholly contrary to MCC policy (A.1241), as well as due process. Inmate presence was deemed an important means of curbing such abuse as well as providing the ancillary benefit of limiting accusations of theft (App. F at 155a), thereby reducing existing tensions.

E. Receipt of Packages

The MCC prohibited entirely receipt by inmates of any package with the exception of a single food package at Christmas. The government defends the restriction on the grounds that it violates no constitutional right and is not arbitrary (Pet. at 34). However, as the government acknowledges (Pet. at 22), the due process clause is violated by restrictions that lack any substantial relation to the objective sought. As found by the court, the evidence established that the package prohibition was nothing less than arbitrary and capricious (App. F at 163a-164a). The record demonstrates that the "dire predictions" of the government witnesses were unsupported by the evidence and belied by experience and the government's own self-contradictions (App. F at 162a). The court of appeals agreed (App. A at 32a).

Since inmates with commissary funds could purchase and keep in their cells a host of items, such as food, clothing, radios, tobacco, and toiletries,* the court found the government's fear

*Some items were quite costly, such as sneakers priced at $18 and radios at $27 (App. F at 164a). As with reading material, indigent inmates are far more dependent for these items on relatives and friends than on their own financial resources.

of storage and sanitation problems from package receipt inconsistent. Further, given the availability of these items in the institution, the government's claim that prohibition on packages was essential to the prevention of inmate extortion and theft was also deemed baseless.

The courts below observed that other prisons -- even those housing known security risks -- have permitted receipt of some packages and that common protective measures are available to search any packages allowed to enter the institution* (App. A at 32a; App. F at 163a-164a). Thus, the courts accurately assessed the prohibition on all packages as a means for excluding contraband to be an overbroad restriction. See Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 133.

* * *

Finally, it must be noted that, pursuant to the urgings of the Court, responsible and informed groups throughout the United States have recently undertaken to deal with prison problems and to formulate standards for the treatment of prisoners.** Well after the commencement of this case in November 1975, the Attorney General established a Federal Corrections Task Force to create a federal correctional policy (Brief on Appeal, fn. at 29). The Draft Federal Standards, prepared by members of the Department of Justice,*** was promulgated in June 1978. Of significance is that the Draft, which hoped to "have relevance ... to the litigating divisions of the Department of Justice" (Introduction at 3), adopts standards contrary to positions taken by the government in this petition.

*The court of appeals expressly noted that the correctional officials were to determine contents and volume of such packages.

**American Medical Association, STANDARDS FOR THE ACCREDITATION OF MEDICAL CARE AND HEALTH SERVICES IN JAILS (Draft Spring 1978); American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (1976); American Bar Association, Tentative Draft on Standards Relating to the Legal Status of Prisoners, 14 Crim.L.Rev. 377 (1977); American Correctional Association Commission on Accreditation for Correctional Institutions, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (August 1977).

***The Justice Department group which drafted the proposed federal standards included Norman Carlson, Director of the Bureau of Prisons.

These developments make it clear that there is a substantial movement on the part of concerned persons to reform the process and to change the realities of practice. These changes may well make it unnecessary for the Court ever to decide some or all of the issues presented by this case. Moreover, even if the issues must ultimately be resolved by the Court, the experience drawn from applying and responding to the new standards will provide the Court with practical guidance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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